S.B.Civil Second Appeal No.137/07
Smt. Kamla vs. Norat Mal Chordia

Date of order: 14.5.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr. M.A.Siddiqui for the appellant.

Heard learned counsel for the appellant.

It will be worthwhile to mentioned here that the appellant-tenant 's second appeal was dismissed by this Court by order dated 9.12.2003 because the appellant failed to compy with the order of this Court dated 17.11.2003 by which the appellant was permitted to remove the defects within two weeks' time. The appellant submitted application for restoration of the appeal which was dismissed by the High Court on 17.11.2003. The appellant preferred leave to appeal before the Hon'ble Supreme Court and leave was granted and appellants Civil Appeal No.2482/06 arising out of SLP(C) No.2566/05 was allowed by the order of the Supreme Court vide judgment dated 5.5.2006 and the second appeal of the appellant was restored and remanded the second appeal to this Court for deciding in accordance with law.

According to the learned counsel for the appellant, in the trial court, plaintiff's suit was dismissed by the order of the trial

court dated 2.3.1998. Though notice was served upon the appellant-defendant on plaintiff's application moved under Order 9 Rule 9,C.P.C. for restoration of the suit but she could not appear and, therefore, the trial court vide order dated 23.5.1998 restored the suit of the plaintiff. According to the learned counsel for the appellant, under sub-rule (1) of Rule 9 of Order 9,C.P.C., it is mentioned that the court may restore the suit of the plaintiff but at the same time it is clearly mentioned in sub-rule (1) of Rule 9 of Order 9,C.P.C. that the court shall appoint a day for proceeding with the suit. The learned counsel for the appellant, submitted that therefore, in view of the said language, the court was under obligation to give a notice of date for appearance of defendant and proceeding with the suit and that has not been given, therefore, the court proceeding with the suit itself was wrong. The learned counsel for the appellant also submitted that the trial court as well as the appellate court proceeded ex parte against the appellant-defendant but without passing any order to proceed ex parte. It is also submitted that the rent deed Ex.3 was admitted in evidence whereas in fact said document was not admissible in evidence.

I considered the submissions of the learned counsel for the appellant.Sub-rule (1) of Rule 9 of Order 9, C.P.C. clearly provides

that the court may restore the suit on the application filed by the plaintiff and as per sub-rule (2) of Rule 9 of Order 9,C.P.C. in case, the suit is dismissed in the presence of the defendant, then the court can restore the suit only after giving notice to the defendant. In this case, the complete procedure was followed and the notice was given to the defendant-appellant before restoring the suit. The trial court also, in the same order, by which the suit was restored, appointed a day for proceeding with the suit. By no stretch of imagination, it can be construed that under sub-rule (1) of Rule 9 of Order 9,C.P.C., any further notice is required to be given to the defendant and the court cannot appoint a day in the order itself for proceeding with the suit. Rather say, sub-rule (1) of Rule 9 of Order 9,C.P.C. is very clear and it provides that the court shall appoint a day for proceeding with the suit and that can be in the order itself and no notice is required to be given to the opposite party for fixing the date for proceeding with the suit.

The defendant-appellant cannot raise question of admissibility of document Ex.3 rent deed which was admitted in evidence by the court without objection of the defendant. Otherwise also, the court could have decreed the suit of the plaintiff on the basis of the oral evidence of tenancy also. Since

the appellant-defendant did appear on any of the subsequent date then she cannot raise objection that order to proceed ex parte was not passed by the court. The trial court could have proceeded against the party who did not choose to appear on any subsequent date in the suit.

In view of the above, no substantial question of law is involved in this appeal. Hence the appeal of the appellant is dismissed.

(**PRAKASH TATIA),J.**

mlt.